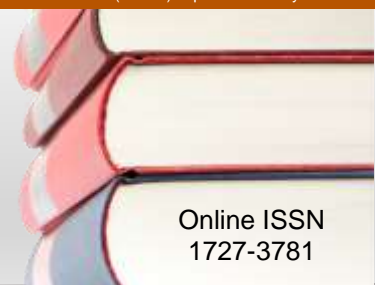


Do the *SALINI* Criteria apply to the Definition of an Investment provided in Annex 1 of the 2006 and 2016 SADC Protocol on Finance and Investment? An Assessment

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Abstract

An investment is the subject matter in an investor-state dispute settlement (ISDS or international arbitration) or litigation case. Therefore, there can be no such dispute if there is no investment to which the dispute relates. The challenge in this regard lies in that there is no uniform definition of an investment in ISDS. Across jurisdictions, legal instruments such as bilateral investment treaties (BITs), treaties with investment provisions (TIPs), investment contracts and legislation provide different definitions of an investment. However, if an investor-state dispute arises, these definitions are not always final, since there are different methods of assessing the existence of an investment, depending on the applicable legal instrument and arbitration rules. For example, arbitration tribunals formed in terms of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention) follow a two-step process which starts with a consideration of the definition of an investment in terms of the underlying legal instrument, followed by an assessment of the existence of an investment in terms of Article 25(1) of the ICSID Convention. *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* is a landmark ICSID ISDS case that proposed four criteria that an investment should meet in terms of Article 25(1) of the ICSID Convention. On the other hand, ISDS cases based on the *United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules* or other non-ICSID rules determine the existence of an investment by reference to the relevant legal instrument only. However, the tribunal in *Romak SA (Switzerland) v Republic of Uzbekistan* held that the *Salini* criteria are applicable to UNCITRAL arbitration, and by implication, to other non-ICSID arbitrations and possibly even litigation. The 2006 Annex 1 of the *SADC Protocol on Finance and Investments* (SADC FIP) defines an investment broadly as any asset, while the 2016 Annex 1 defines an investment as an enterprise incorporated in a SADC Member State and owned by SADC nationals. Furthermore, the 2006 Annex 1 refers investor-state disputes to ICSID or UNCITRAL arbitration, while the 2016 Annex 1 refers such disputes to the courts of host states. This article has two objectives. Firstly, it seeks to determine if, as was held in *Romak*, the *Salini* criteria can be applied to the definition of an investment in non-ICSID arbitration and litigation arising from the 2006 or 2016 Annex 1s respectively. Secondly, the article will assess the implications of such an application of the *Salini* criteria to the protection of foreign investments in the SADC.

Keywords

India Model BIT; ICSID Arbitration; ICSID Convention; Investment; *Bernhard von Pezold v Zimbabwe*; *Romak v Uzbekistan*; *Salini v Morocco*; SADC Protocol on Finance and Investment; Pan African Investment Code; UNCITRAL Arbitration.

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1 The meaning of an investment in ISDS

1.1 Introduction

An investment is the subject-matter in an ISDS case. Hence an investment must exist in order for an arbitral tribunal or court of law to have subject-matter jurisdiction (jurisdiction *rationae materiae*).¹ ISDS cases predominantly take place in terms of the provisions of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention)² and the *United Nations Commission on International Trade Law Arbitration Rules* (UNCITRAL Arbitration Rules)^{3,4} The ICSID arbitration rules require that in order for an arbitration tribunal to have jurisdiction⁵ *rationae materiae*, there must be a

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¹ See Schreuer *ICSID Convention* para 113. For cases relating to jurisdiction *rationae materiae* see *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v Republic of Estonia* (ICSID Case No ARB/99/2) Award of 25 June 2001 (*Alex Genin*); *Generation Ukraine Inc v Ukraine* (ICSID Case No ARB/00/9) Award of 16 September 2003; *Camuzzi International SA v the Argentine Republic* (ICSID Case No ARB/03/2) Decision on Objections to Jurisdiction of 11 May 2005; *Enron Corporation and Ponderosa Assets LLP v The Argentine Republic* (ICSID Case No ARB01/3) Decision on Jurisdiction (Ancillary Claim) of 2 August 2004 (*Enron*); *H&H Enterprises Investments Inc v Arab Republic of Egypt* (ICSID Case No ARB/09/15) Decision on Jurisdiction of 5 June 2012; *Nordzucker AG v The Republic of Poland* (Ad hoc Tribunal) Partial Award of 10 December 2008; *Nova Scotia Power Incorporated (Canada) v Bolivarian Republic of Venezuela* (ICSID Case No ARB (AF)/11/1) Excerpts of Award of 30 April 2014; *Sempra Energy International v The Argentine Republic* (ICSID Case No ARB/02/16) Decision on Objections to Jurisdiction of 11 May 2005; *Siemens AG v The Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction of 3 August 2004; *Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003; *Société Generale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic* (UNCITRAL Arbitration, LCIA Case No UN 7927) Award on Preliminary Objections to Jurisdiction of 19 September 2008; *Standard Chartered Bank v United Republic of Tanzania* (ICSID Case No ARB/10/12) Award of 2 November 2012.

² *Convention on the Settlement of Investment Disputes between States and Nationals of Other States (with Rules and Regulations)* (1965) (ICSID Convention). For caseload statistics see ICSID 2020 <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx>.

³ *United Nations Commission on International Trade Law Arbitration Rules* (2013) (UNCITRAL Arbitration Rules) (see UNCITRAL 2013 <https://www.acerislaw.com/wp-content/uploads/2018/08/2013-UNCITRAL-Arbitration-Rules.pdf>).

⁴ According to the UNCTAD Policy Hub, as of 19 January 2020, 528 out of 983 known ISDS cases were opened under ICSID arbitration rules, while 308 cases were opened under the UNCITRAL arbitration rules (UNCTAD 2020 <https://investmentpolicy.unctad.org/investment-dispute-settlement>). All 983 cases can be accessed via this site.

⁵ For statistics regarding the legal instruments on which consent to ICSID jurisdiction was given see ICSID 2019 [https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_\(English\).pdf](https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf) 11. For a review of arbitral decisions see UNCTAD 2019 <https://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx>.

legal dispute⁶ which must arise directly out of an investment.⁷ Article 25(1) of the ICSID Convention requires that there must be an investment in order for an ICSID tribunal to have jurisdiction *rationae materiae*.⁸ On the other hand, the UNCITRAL Arbitration Rules do not have a similar provision. Historically, sixteen per cent (116) of all (728) ICSID cases heard by tribunals up to 30 June 2019 were rejected for lack of jurisdiction.⁹ A key challenge in this regard is that in ICSID arbitration there is no definition of an investment, and furthermore there is no uniformity in tribunal practice regarding the definition of investment, as will be shown below. In addition, the methods used to determine the existence of an investment differ, depending on whether an arbitration is in terms of the ICSID Convention or non-ICSID arbitration rules. These complexities have a negative, unpredictable and at times shocking impact on investors. In the worst case they may result in the disqualification of investments that appeared to be protected by underlying legal instruments. For host states, the worst case is that some definitions of investments may when applied by arbitral tribunals be of such a broad scope that they may cover assets that host states did not contemplate would be covered as investments.

The methods used to determine the existence of an investment in ICSID and non-ICSID arbitrations will be briefly described, so as to indicate their differences and some issues arising therefrom.

⁶ A full discussion of this requirement is beyond the scope of this article. For further information see Dolzer and Schreuer *Principles of International Investment Law* 245-246; Schreuer *ICSID Convention* paras 41-82 – 76-82; *Abaclat (Case Formerly Known as Giovanna A Beccara) v The Argentine Republic* (ICSID Case No ARB/07/05) Decision on Jurisdiction and Admissibility of 4 August 2011 (*Abaclat*) paras 254-256, 301-331; *AES Corporation v The Argentine Republic* (ICSID Case No ARB/02/17) Decision on Jurisdiction of 26 April 2005 paras 43-47; *Azurix Corp v The Argentine Republic* (ICSID Case No ARB/01/12) Decision on Annulment of 1 September 2009 paras 58-66; *Lao Holdings NV v Lao People's Democratic Republic* (ICSID Case No ARB (AF)/12/6) Decision on Jurisdiction of 21 February 2014 paras 120-121; *Mavrommatis Palestine Concessions Case* 1924 PCIJ Ser A No 2 11-12; *Noble Energy Inc and Machala Power Cía Ltd v Republic of Ecuador and Consejo Nacional de Electricidad* (ICSID Case No ARB/05/12) Decision on Jurisdiction of 5 March 2008 para 123; *Société Générale de Surveillance SA v Republic of the Philippines* (ICSID Case No ARB/02/6) Order of the Tribunal on Further Proceedings of 17 December 2007 para 19; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic* (ICSID Case No ARB/09/1) Decision on Jurisdiction of 21 December 2012 paras 117-125; *Tokios Tokelés v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction of 29 April 2004 para 15.

⁷ A full discussion of this requirement is beyond the scope of this article. For further information see Schreuer *ICSID Convention* paras 113-174.

⁸ See also Fellenbaum 2011 *Arb Int'l* 249-266; Grabowski 2014 *Chi J Int'l L* 287-309; Schreuer *ICSID Convention* 71-347; Timmer 2012 *J Int'l Arb* 363-373.

⁹ ICSID 2019 [https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_\(English\).pdf](https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf) 7, 13.

ICSID arbitration tribunals conduct a two-step, "double barrelled" or "double keyhole" process in order to determine whether or not an investment exists.¹⁰ In the first step a determination is made as to whether an asset, transaction, project, business etc. is an investment in terms of the applicable BIT, TIP, host state legislation, or an investment contract.¹¹ If the asset, transaction, project, business etc. qualifies as an investment at this stage, then the enquiry moves to the second stage.¹² At this stage, an assessment is made as to whether the asset, transaction, project, business etc. is an investment in terms of Article 25(1) of the ICSID Convention.¹³ It is during this second stage that tribunals consider the criteria or characteristics that an asset must meet in order to qualify as an investment. If an enquiry into the existence of an investment concludes that no investment was made, then that is the end of the case. This makes this stage critical and highly contentious for investors and host states alike.

*Salini Construttori SPA and Italstrade SPA v Kingdom of Morocco*¹⁴ is a landmark ICSID case in this regard, as it was the first case to consider in detail the criteria that an investment must meet in terms of Article 25(1) of the ICSID Convention (the *Salini* criteria). Since the decision was rendered in 2001, the *Salini* criteria has become a regular feature in subsequent tribunals, as shown in the next section.

Like their international counterparts, SADC states have been respondents in ISDS cases wherein the tribunals considered the existence of an investment.¹⁵ Notable examples are *Bernadus Hendricus Funekkotter v Republic of Zimbabwe*,¹⁶ *Bernhard Von Pezold v Republic of Zimbabwe*,¹⁷ *Biwater Gauff*

¹⁰ See Schreuer *ICSID Convention* 117-118.

¹¹ See for example *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16) Award of 8 November 2010 (*Alpha Projektholding*) para 254; *Ambiente Ufficio SPA v The Argentine Republic* (ICSID Case No ARB/08/9) Decision on Jurisdiction and Admissibility of 8 February 2013 (*Ambiente*) para 435; *Malaysian Historical Salvors Sdn, BHD v The Government of Malaysia* (ICSID Case No ARB/05/10) Award on Jurisdiction of 17 May 2007 (*Malaysian Historical Salvors*) para 55; *Millicom International Operations BV and Sentel GSM Claimants v The Republic of Senegal* (ICSID Case No ARB/08/20) Decision on Jurisdiction of 16 July 2010 (*Millicom*) paras 76-78.

¹² See for example *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain* (ICSID Case No ARB14/1) Award of 16 May 2018 para 196.

¹³ See for example *Alpha Projektholding* paras 254, 264, 303, 309-310, 332.

¹⁴ *Salini Construttori SPA and Italstrade SPA v Kingdom of Morocco* (ICSID Case No ARB 00/4) Decision on Jurisdiction of 16 July 2001 (*Salini*).

¹⁵ For access to ISDS cases by country see UNCTAD 2020 <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

¹⁶ *Bernadus Hendricus Funekkotter v Republic of Zimbabwe* (ICSID Case No ARB/05/6) Award of 22 April 2009.

¹⁷ *Bernhard Von Pezold v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award of 28 July 2015 (*Bernhard Von Pezold*).

(*Tanzania*) v *United Republic of Tanzania*,¹⁸ *Mr Patrick H Mitchell v The Democratic Republic of Congo*¹⁹ and *Standard Chartered Bank v United Republic of Tanzania*.²⁰

There will surely be new cases in the future. For example, the Republics of Madagascar,²¹ Mauritius,²² Mozambique²³ and Tanzania²⁴ faced new ICSID arbitration claims during 2017.²⁵ Tanzania was threatened with new claims as a result of recent legislative amendments to its natural and mining resources legislation.²⁶ Large mining companies were quick to challenge the above amendments. For example, on 4 July 2017 Acacia Mining announced that it was commencing arbitration against Tanzania relating to the Bulyanhulu Mine and Uzwagi Mine, based on these amendments.²⁷ After ten days, AngloGold Ashanti announced that it too had commenced arbitration against Tanzania relating to its Geita Mine.²⁸

Therefore, like others before them the tribunals in these new arbitrations will have to go through the process of determining the existence of investments. In particular, non-ICSID arbitral tribunals and courts will face the question of whether or not to apply the *Salini* criteria to the definition of an investment provided in 2006 or 2016 Annex 1. If so, what will be the implications thereof for the protection of foreign investments in the SADC?

It is against this background that this article seeks to address whether or not the *Salini* criteria can be applied to the definitions of an investment provided in the

¹⁸ *Biwater Gauff (Tanzania) v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award of 24 July 2008 (*Biwater Gauff*).

¹⁹ *Mr Patrick H Mitchell v The Democratic Republic of Congo* (ICSID Case No ARB/99/7) Excerpts from Award of 9 February 2004.

²⁰ *Standard Chartered Bank v United Republic of Tanzania* (ICSID Case No ARB/10/12) Award of 2 November 2012.

²¹ (DS)2, SA, *Peter de Sutter and Kristof de Sutter v Republic of Madagascar* (ICSID Case No ARB/17/18), pending; *LTME Mauritius and Madamobil Holdings Mauritius Limited v Republic of Madagascar* (ICSID Case No ARB/17/28), pending.

²² *Thomas Gosling v Republic of Mauritius* (ICSID Case No. ARB/16/32).

²³ *CMC Muratori Construction CMC Di Ravenna SOC Coop, CMC MuratoriCementisti CMC Di Ravenna SOC Coop ARL Maputo Branch and CMC Africa, CMC Africa Austral, LDA v Republic of Mozambique* (ICSID Case No ARB/17/23), pending.

²⁴ *Eco Development in Europe AB v United Republic of Tanzania* (ICSID Case No ARB/17/33), pending.

²⁵ Unfortunately details of these arbitrations were not public at the time of writing.

²⁶ The legislation is the *Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017*, the *Natural Wealth and Resources (Permanent Sovereignty) Act, 2017*, and the *Written Law (Miscellaneous Amendments) Act, 2017*.

²⁷ See Acacia 2017 <http://www.acaciamining.com/~media/Files/A/Acacia/press-release/2017/update-on-developments-in-tanzania-20170704.pdf>.

²⁸ See AngloGold Ashanti 2017 https://thevault.exchange/?get_group_doc=143/1501167539-PR20170713Geita.pdf.

2006 and 2016 Annex 1. Secondly, the article will assess the implications of the application of the *Salini* criteria to the protection of foreign investments in the SADC. This will be done as follows.

The next section will discuss the determination of the existence of an investment in ICSID and non-ICSID arbitration. This will be followed by a discussion of the definition of an investment in terms of the 2006 and 2016 Annex 1s. The applicability of the *Salini* criteria to these annexes will then be discussed. Finally the legal implications of the use of the *Salini* criteria in the two annexes will be discussed, and the article will draw to a conclusion.

1.2 The determination of an investment in ICSID and non-ICSID arbitration

There are three factors that make the determination of the existence of an investment in terms of Article 25(1) of the ICSID Convention complicated in practice. The first is that the drafters of the ICSID Convention deliberately abstained from defining what an investment is.²⁹ Secondly, ICSID arbitral tribunals do not agree on what an investment is, as will be shown below. This is further complicated by the fact that the doctrine of judicial precedent does not apply in ISDS, with the result that no tribunal can make a final ruling on the matter.³⁰ Thirdly, it is not settled whether an ICSID arbitral tribunal is bound by the definition of an investment provided by a BIT or a TIP. There are at least three views on this issue. One view is to the effect that an ICSID tribunal is not limited or bound by the definition of an investment contained in a treaty.³¹ The second view is to the effect that the definition of an investment in a treaty is authoritative.³²

²⁹ See for example *Philip Morris Brand SARL, Philip Morris Products SA, Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No ARB10/7) Award of 8 July 2016 (*Philip Morris Brand SARL*) paras 197-198; *Alpha Projektholding* para 311; *Ambiente* para 439; *Frank Charles Araf v Republic of Moldova* (ICSID Case No ARB/11/23) Award of 8 April 2013 para 362; *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia* (ICSID Case No ARB 05/18 and 07/15) Award of 3 March 2010 (*Ioannis Kardassopoulos*) para 116; *Inmaris Perestroika Sailing Maritime Services GMBH v Ukraine* (ICSID Case No ARB/08/8) Decision on Jurisdiction of 8 March 2010 (*Inmaris*) para 128; *Malaysian Historical Salvors* para 56.

³⁰ See for example *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction of 2 June 2010 para 100; *Enron* paras 25, 170-171; *Malaysian Historical Salvors* para 56.

³¹ *Alex Genin* para 324; *Fedax NV v The Republic of Venezuela* (ICSID Case No ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997 (*Fedax*) paras 20-30; *Ioannis Kardassopoulos* para 113; *Joy Mining v Arab Republic of Egypt* (ICSID Case No ARB/03/11) Award on Jurisdiction of 6 August 2004 para 50; *Patrick Mitchell v The Democratic Republic of Congo* (ICSID Case No ARB/99/7) Decision on Annulment of Award of 1 November 2006 para 31; *Salini* paras 43-44, 45-58; *SGS Société Générale de Surveillance SA v The Republic of Paraguay* (ICSID Case No ARB/07/29) Award of 10 February 2012 para 80.

³² *Alpha Projektholding* para 314.

A third, flexible view suggests that the term "investment" is to be given a broad meaning.³³

On the other hand, in UNCITRAL and other non-ICSID arbitration, a tribunal needs only to assess whether an asset, transaction, project, business etc. is an investment in terms of the applicable BIT, TIP, host state legislation, or an investment contract etc.³⁴ This single-step approach is applied in cases that do not apply the *Salini* criteria, such as the *Yukos Universal v The Russian Federation* group of cases,³⁵ where the tribunals of first instance subsequently ordered the respondent to pay approximately USD 50 billion in damages.³⁶

However, the decision of an UNCITRAL tribunal in *Romak SA (Switzerland) v Republic of Uzbekistan*³⁷ during 2009 held that the *Salini* criteria can be applied to non-ICSID arbitration. *Romak* was selected for discussion here for three reasons.³⁸ Firstly, the tribunal's reasons for its decision are well spelled out. Secondly, the definition of an investment that was at issue in *Romak* is similar to that provided by the 2006 Annex 1 of the *SADC Protocol on Finance and Investments* (SADC FIP; 2006 Annex 1). Even though *Romak* did not invent the criteria that it applied,³⁹ and it was not the first or the last non-ICSID tribunal to consider whether to apply the *Salini* criteria or not,⁴⁰ the approach adopted by the tribunal makes the decision worthy of consideration.⁴¹ Thirdly, a decade after it

³³ *Ambiente* para 470.

³⁴ *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya* (ICSID Case No ARB/15/29) Award of 22 October 2018 (*Cortec Mining*) paras 139-140; *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia* (PCA Case No 2013-15) Award of 22 November 2018 (*South American Silver*) paras 315, 340. Both cases declined to apply *Salini* to UNCITRAL arbitration.

³⁵ *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (PCA Case No AA 226) Interim Award on Jurisdiction and Admissibility of 30 November 2009 paras 429-435; *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No AA 227) Interim Award on Jurisdiction and Admissibility of 30 November 2009 paras 430-436; *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (PCA Case No AA 228) Interim Award on Jurisdiction and Admissibility of 30 November 2009 paras 429-435.

³⁶ *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (PCA Case No AA 226) Final Award of 18 July 2014; *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No AA 227) Final Award of 18 July 2014; *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (PCA Case No AA 228) Final Award of 18 July 2014. This decision was subsequently annulled. The annulment proceedings were ongoing at the time of writing. For updates and documents see *italaw* 2020 <https://www.italaw.com/cases/1175>.

³⁷ *Romak SA (Switzerland) v Republic of Uzbekistan* (PCA Case No AA280) Award of 26 November 2009 (*Romak*).

³⁸ For a discussion of *Romak* see also Musurmanov 2013 *Aust ILJ* 105-129.

³⁹ Musurmanov 2013 *Aust ILJ* 117.

⁴⁰ Musurmanov 2013 *Aust ILJ* 126.

⁴¹ See for example Musurmanov 2013 *Aust ILJ* 127 where it is said that: "... this award is important because of its exhortation of the necessity to determine the application of art 25(1) of the *ICSID Convention* to BITs, its interpretation of the *Salini* test, and its decision

was rendered, the decision in *Romak* was recently followed (by agreement of the parties and the tribunal) in *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius*.⁴² Furthermore, as will be shown below, regulatory instruments are gradually incorporating the *Salini* criteria into their definitions of an investment.

Briefly, the facts in *Romak* are as follows.⁴³ Romak was a Swiss company that specialised in the international trading in cereals. During 1996 Romak entered into a contract for the once-off supply of wheat to the Republic of Uzbekistan. Romak delivered the required quantity of wheat,⁴⁴ but it did not receive payment for the goods sold. Consequently, Romak instituted proceedings to recover the monies due to it, to no avail.⁴⁵ As a result, on 29 March 2006 Romak commenced UNCITRAL arbitration in terms of the Swiss Confederation and the Republic of Uzbekistan Bilateral Investment Treaty on the Promotion and the Reciprocal Protection of Investments of 1993.⁴⁶

Uzbekistan objected to the tribunal's jurisdiction on the basis, among others, that Romak did not own an investment protected by the BIT.⁴⁷ Uzbekistan also argued that the sale of goods (in this case wheat) did not constitute an investment, and that to interpret the term otherwise would expand the notion of "investment" almost infinitely.⁴⁸ Uzbekistan relied on the *Salini* criteria,⁴⁹ and urged the tribunal to adopt a narrow, limited interpretation of the definition of an investment in terms of Article 1(2) of the BIT.⁵⁰ On the other hand, Romak argued that Article 1(2) of the BIT included a broad definition of an investment that includes "every kind of asset" having economic value.⁵¹ Romak also distinguished between investment treaty arbitration in terms of Article 25(1) of the ICSID Convention, which applies the two-step process described above, and arbitration in terms of the UNCITRAL Arbitration Rules, which applies a single step to determine if an investment

'to establish a link between ad hoc and ICSID disputes and to reveal that this "inherent meaning" is finally irrespective of the choice of the dispute resolution mechanism'.

⁴² *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius* (PCA Case No 2018-37) Award on Jurisdiction of 23 August 2019 paras 118-120.

⁴³ See also Musurmanov 2013 *Aust ILJ* 112-114.

⁴⁴ *Romak* paras 41-41.

⁴⁵ *Romak* paras 52-70.

⁴⁶ *Romak* para 71.

⁴⁷ *Romak* paras 97-100, 163.

⁴⁸ *Romak* para 98.

⁴⁹ *Romak* paras 104-105.

⁵⁰ *Romak* paras 100, 175.

⁵¹ *Romak* paras 100, 175.

exists.⁵² Romak therefore argued that the *Salini* criteria were inapplicable to the case, since they had been developed in the context of ICSID case law.⁵³

The scene was therefore set for what would become a momentous decision by the tribunal.

Before delving into the tribunal's decision, it is proper to consider the definition of an investment in terms of the Swiss-Uzbekistan BIT, since this provision is what was at issue. Article 1(2) of the Swiss-Uzbekistan BIT defined an investment as every kind of asset and particularly movable and immovable property, shares, claims to money, copyright, industrial property rights and concessions under public law.⁵⁴

At first glance one would think that any asset that fell within any of the above asset categories qualified as an investment, as Romak argued.⁵⁵ But the tribunal in *Romak* held that this is not the case.⁵⁶ The tribunal held that the approach advanced by Romak deprives the term "investments" of any inherent meaning, which is contrary to the logic of Article 1(2) of the BIT.⁵⁷ The tribunal further held that a literal application of the terms of the BIT effectively ignores Article 31(1) of the *Vienna Convention on the Law of Treaties*, which requires that the "ordinary meaning" of the terms of a treaty must be considered, together with their context and the object and purpose of the treaty.⁵⁸

According to the tribunal, a mechanical application of the asset categories listed in Article 1(2) of the BIT would produce "*a result which is manifestly absurd or unreasonable*", which would be contrary to Article 32(b) of the Vienna Convention.⁵⁹ The tribunal added that accepting Romak's argument would mean that every contract entered into between a Swiss national and a State entity of Uzbekistan would, regardless of the nature and object of the contract, constitute an investment under the BIT.⁶⁰ Furthermore, a broad interpretation of the BIT would result in commercial transactions qualifying as investments.⁶¹

The tribunal applied the ordinary meaning of the term "investment", and held that an investment entails a contribution made over a period of time, and involves

⁵² *Romak* para 106.

⁵³ *Romak* para 107.

⁵⁴ *Romak* paras 97, 174.

⁵⁵ *Romak* at paras 175, 178.

⁵⁶ *Romak* paras 179, 188.

⁵⁷ *Romak* para 180.

⁵⁸ *Romak* paras 181, 206.

⁵⁹ *Romak* paras 184.

⁶⁰ *Romak* para 187.

⁶¹ *Romak* para 185.

some measure of risk.⁶² The term "investment" has an inherent meaning, distinct from the asset categories stated in the BIT.⁶³ Furthermore, said the tribunal, the asset categories stated in the BIT are illustrations only.⁶⁴ Therefore, the fact that an asset fell under a particular category does not mean that such an asset is a qualifying investment.⁶⁵ The tribunal held that the object and purpose of the BIT must be considered in order to shed light on whether an asset is an investment or not.⁶⁶ In the event, the tribunal found that the object and purpose of the BIT was not useful in this regard.⁶⁷ Consequently, the tribunal resorted to legal doctrine and tribunal decisions to take the analysis further.⁶⁸

The tribunal disagreed with Romak that the definition of an investment must differ, based on whether arbitration is in terms of the ICSID or UNCITRAL Rules.⁶⁹ The tribunal held that this would lead to absurd and unreasonable results.⁷⁰ The tribunal then applied the *Salini* criteria to the definition provided by the BIT, and concluded that the criteria were not met.⁷¹

The next section will discuss the *Salini* criteria. This will be followed by a discussion of the definition of an investment in terms of the 2006 and 2016 Annex 1.

1.3 The characteristics of an investment in terms of *Salini*

It has been stated above that there is no uniform definition of an investment in terms of the ICSID Convention, UNCITRAL or other arbitration rules.⁷² Schreuer laid the basis for the current debate on what an investment ought to be when he said that:⁷³

... a qualifying project must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development.

⁶² Romak paras 188, 206.

⁶³ Romak paras 188, 207.

⁶⁴ Romak para 188.

⁶⁵ Romak para 188.

⁶⁶ Romak paras 189, 206.

⁶⁷ Romak para 189.

⁶⁸ Romak para 190.

⁶⁹ Romak para 194.

⁷⁰ Romak para 194.

⁷¹ Romak paras 198-204, 213-242.

⁷² See also Schreuer *ICSID Convention* paras 148-174.

⁷³ *Fedax* para 43; Schreuer *ICSID Convention* para 153. Emphasis added.

Fedax was the first case to consider the above criteria, followed by *Ceskoslovenska Obchodni Banka, AS v Slovak Republic* (hereafter *CSOB*).⁷⁴ Thereafter *Salini* discussed the criteria, and accepted all but the requirement of profit, as did subsequent cases.⁷⁵ The tribunal in *Salini* held that an investment must meet the following requirements: there must be a contribution by the investor, the investment must be of a qualifying duration, the investment must involve a risk taken by the investor, and the investment must be of economic benefit to the host state.⁷⁶ *Salini* thus set the scene for the current debate about what an investment is or ought to be.⁷⁷

Each of the *Salini* criteria will now be briefly discussed in order to indicate how subsequent decisions responded thereto.⁷⁸

1.3.1 Contribution

This criterion entails that an investor must contribute some resources towards an investment. Based on this approach, if an investor is found not to have contributed anything to a project or a transaction, a tribunal may rule that it did not make an investment. Thus, where an investment was a shareholding acquired via loans that did not have to be paid, it has been held that the acquisition of the shares does not amount to an investment.⁷⁹

Examples of situations where the requirement of a contribution was found to have been met are: the contribution of funds, equipment, personnel and expertise in infrastructure projects,⁸⁰ the investment of funds to upgrade and operate a

⁷⁴ *Ceskoslovenska Obchodni Banka, AS v Slovak Republic* (ICSID Case No ARB/97/4) Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999.

⁷⁵ *Salini* paras 52-58; *Malaysian Historical Salvors* para 108. However, in *Achmea BV (formerly Eureko) v The Slovak Republic* (PCA Case No 2008-13) Final Award of 7 December 2012 the tribunal held that the making of an investment "necessarily implied the right to enjoy the profitability of a return on the investment, if it proves profitable" (para 281).

⁷⁶ *Salini* para 52. Schreuer *ICSID Convention* para 157 says that most tribunals did not adopt the profit requirement.

⁷⁷ See Schreuer *ICSID Convention* 129-134.

⁷⁸ For a critique of *Salini* see Andreeva 2008 *LPICT* 161-176; Bechky 2014 *LDR* 313-327; Demirkol 2015 *TCLR* 41-49; Desierto 2011 *TL&D* 296-333; Dupont 2011 *JWIT* 245-272; Engfeldt 2014 *Berkeley J Int'l L* 44-63; Exelbert 2016 *Fordham L Rev* 1243-1279; Garay 2017 *BU Int'l LJ* 397-424; Grabowski 2014 *Chi J Int'l L* 287-309; Musurmanov 2013 *Aust ILJ* 105-129; Okpe 2017 *JSDLP* 133-154; Vargiu 2009 *JWIT* 753-768; Yala "Notion of 'Investment' in ICSID Case Law".

⁷⁹ *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB 09/8) Award of 17 October 2013 (*KT Asia*) paras 204, 206.

⁸⁰ *Salini* para 53; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction of 14 November (*Bayindir*) 2005 paras 116, 120 and 131.

hotel,⁸¹ the contribution of funds, expertise, and knowledge in the performance of a salvage operation of an old shipwreck,⁸² and the establishment of and financing of a mobile phone network.⁸³

Where more than one investor is involved in a project, a tribunal will look at their combined investments to determine if the group as a whole made an investment.⁸⁴ It often happens, especially with regard to insolvent businesses, that a business is sold for a nominal price, such as 1 United States Dollar. Tribunals have held that in such situations the payment of a nominal price to acquire an investment is not a bar to meeting the requirement of a contribution, provided the investor has a bona fide intention of undertaking economic activities through the investment.⁸⁵ Overall, this criterion has not been problematic.⁸⁶

1.3.2 Duration

In terms of this criterion, an investment should be held for a medium- to long-term duration, although there is no specific minimum period that is agreed among tribunals.⁸⁷ Tribunal decisions offer guidance in this regard. On the low end, a duration of 18 months was rejected.⁸⁸ It appears that medium- to long-term investments are preferred. A duration of two to three years has been found to be acceptable by various tribunals.⁸⁹ At the top end, investment periods of 26⁹⁰ and 20 years were found to be sufficient.⁹¹ The time taken to tender for a contract, work interruption, the negotiation of contracts and extensions thereof are taken into consideration when determining the duration of an investment.⁹²

⁸¹ *Helnan International Hotels A/S v The Arab Republic of Egypt* (ICSID Case No ARB/05/19) Decision on Jurisdiction of 17 October 2006 (*Helnan*) para 77.

⁸² *Malaysian Historical Salvors* para 109.

⁸³ *Millicom* para 80.

⁸⁴ *Ambiente* para 483; *Inmaris* para 96.

⁸⁵ *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/05) Award of 15 April 2009 (*Phoenix Action*) para 122.

⁸⁶ Schreuer *ICSID Convention* 161.

⁸⁷ *KT Asia* paras 207, 216.

⁸⁸ *Malaysian Historical Salvors* 37 para 111(b).

⁸⁹ Schreuer *ICSID Convention* para 162; *Bayindir* para 133; *Ioannis Kardassopoulos* para 117; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Decision on Jurisdiction of 16 June 2006 para 95; *Malaysian Historical Salvors* paras 101-102; *Salini* para 54.

⁹⁰ *Helnan* at para 77.

⁹¹ *Millicom* para 80.

⁹² Schreuer *ICSID Convention* para 162.

1.3.3 Risk

In terms of this criterion, an investment must have a measure of risk to qualify as an investment.⁹³ Ordinary commercial risk will not suffice.⁹⁴ The following are circumstances where the risk was found to be acceptable:

- (a) In the case of an equity investment, where the risk is that the value of the equity may depreciate.⁹⁵
- (b) Where an investor had to issue bank guarantees for huge sums of money in favour of the host state, risking an unlawful call of these sums by the state.⁹⁶
- (c) The refurbishing of a hotel to five-star quality.⁹⁷
- (d) The conduct of the claimant's operation under prevailing adverse economic and political circumstance.⁹⁸
- (e) The experiencing of work stoppages and the subsequent necessity to renegotiate the contract.⁹⁹
- (f) The existence of a dispute relating to the payment of capital and interest was sufficient proof of risk.¹⁰⁰
- (g) A nominal investment in businesses that were financially depressed.¹⁰¹

1.3.4 Benefit to the host state

In terms of this criterion, an investment must make a significant contribution to the economy of a host state. The tribunals in *Fedax*,¹⁰² *Salini*¹⁰³ and *CSOB*¹⁰⁴ were early adopters of this requirement. This requirement has since been adopted in subsequent cases, with varying emphasis on the scale of the

⁹³ *Salini* para 217.

⁹⁴ *Malaysian Historical Salvors* para 39.

⁹⁵ *KT Asia* paras 206, 217-219.

⁹⁶ *Bayindir* paras 135-136.

⁹⁷ *Ioannis Kardassopoulos* para 77.

⁹⁸ Schreuer *ICSID Convention* para 163; *Alpha Projektholding* para 320; *Ioannis Kardassopoulos* para 117.

⁹⁹ *SAIPEM SPA v The Peoples Republic of Bangladesh* (ICSID Case No ARB/05/07) Decision on Jurisdiction of 21 March 2007 para 109.

¹⁰⁰ *Fedax* para 40.

¹⁰¹ *Phoenix Action* para 127.

¹⁰² *Fedax* para 40.

¹⁰³ *Salini* para 52.

¹⁰⁴ *CSOB* para 97.

economic contribution to the host state, as can be seen in the analysis of tribunal decisions conducted in *Malaysian Historical Salvors*.¹⁰⁵

1.4 Responses to *Salini*

Despite the adoption of the *Salini* criteria as indicated in the preceding section, various tribunals declined to follow *Salini*,¹⁰⁶ while support for *Salini* is not waning either.¹⁰⁷ As a result, in ICSID arbitration there is still no agreement among tribunals or scholars with regard to the criteria that an investment must meet for the purpose of Article 25(1) of the ICSID Convention. Neither is there agreement with regard to whether the *Salini* criteria are mandatory, or whether they can be applied to non-ICSID arbitration. This does not bode well for the regulation of foreign investments, as it perpetuates the gap between ICSID and non-ICSID arbitration with regard to how the existence of investments is determined. This is the gap that *Romak* sought to close.

In response to the controversy surrounding the question of the legal status of the *Salini* criteria, Schreuer revisited the debate and clarified his original notion of what an investment ought to be. Schreuer said that the *Salini* criteria are merely typical, non-mandatory characteristics of investments under the ICSID Convention.¹⁰⁸ Despite this flexibility, some tribunals including *Bernhard Von Pezold* continued to refuse to apply the criteria on the grounds that they are not

¹⁰⁵ *Malaysian Historical Salvors* paras 68, 105, 113, 124; 125. See also *Alpha Projektholding* para 330; *Bayindir* para 113, 137, 145; *Helnan* para 77; *Inmaris* paras 96, 132; *Phoenix Action* para 133.

¹⁰⁶ *Abacat* para 364; *Alpha Projektholding* para 311; *Ambiente* para 479; *Biwater Gauff* paras 312-316; *Consorzio Goupemente LESI-DIPENTA (Italy) v Peoples Democratic Republic of Algeria* (ICSID Case No ARB/03/08) Award of 10 January 2005 para 13(iv); *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No ARB/09/02) Award of 31 October 2012 paras 294-295; *GEA Group AktienGesellschaft v Ukraine* (ICSID Case No ARB/08/16) Award of 31 March 2011 paras 314; *Global Trading Resource Corp and Globex International, Inc v Ukraine* (ICSID Case No ARB/09/11) Award of 1 December 2011 para 55; *Hassan Awdi, Enterprise Business Consultants, Inc, and Alfa El Corporation v Romania* (ICSID Case No ARB/10/13) Award of 2 March 2015 para 197; *KT Asia* paras 171-173; *Malaysian Historical Salvors* paras 89, 106(e); *Mr Patrick Mitchell v The Democratic Republic of Congo* (ICSID Case No ARB/99/7) Decision on Annulment of Award of 1 November 2006 paras 28, 32-33; *Phillip Morris Brand SARL* paras 201-206; *Phoenix Action* paras 101-144; *Quiborax SA, Non-Metallic Minerals SA and Alan Fosc Kaplun v Plurinational State of Bolivia* (ICSID Case No ARB/06/02) Decision on Jurisdiction of 27 September 2012 76 paras 220, 225; *South American Silver* para 340; *White Industries Australia Limited v The Republic of India* (UNCITRAL) Final Award of 30 November 2011 paras 7.4.8-7.4.9.

¹⁰⁷ See for example *Cortec Mining* para 300.

¹⁰⁸ Cited in *Ambiente* paras 480-481; Schreuer *ICSID Convention* 128 para 153; *Philip Morris Brand SARL* para 206.

authoritative, which clearly misses the point.¹⁰⁹ The result is that in the SADC there is uncertainty regarding the applicability of the *Salini* criteria to ISDS cases.

The next section discusses the definition of an investment in terms of the SADC FIP.

2 The definition of an investment in terms of the 2006 and 2016 Annex 1s of the SADC FIP

2.1 Background

In general there are three categories of definitions of investments.¹¹⁰ The first is an open-list or non-exhaustive asset-based definition.¹¹¹ The second is a closed-list or exhaustive asset-based definition.¹¹² The third is an enterprise-based definition.¹¹³ The first category is broad and thus covers a wider array of investments, while the other two are narrow in scope and therefore protect a limited scope of investments. In particular the third category is more restrictive than the second, as it recognises only investments held in the form of a business.

More specifically, each of the above categories of the definition of an investment impacts upon investments in different ways. A non-exhaustive, asset-based definition exposes host states to more claims than the other two definitions.¹¹⁴ However, it can be reined in by the application of additional considerations such as the *Salini* criteria, as was the case in *Romak*. A closed asset-based definition provides moderate coverage to investments,¹¹⁵ while an enterprise-based definition has the most narrow investment coverage, since it protects investments that are in the form of an incorporated business only.¹¹⁶ This is akin to what is contemplated in the *Salini* criteria, if one considers all of the *Salini* criteria.

In the SADC the 2006 Annex 1 and its successor the *Southern African Development Community Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment* (2016 Annex 1) provide the definitions of an investment.¹¹⁷ The 2016 Annex 1 came into effect on 24

¹⁰⁹ *Bernhard Von Pezold* para 285.

¹¹⁰ Kondo 2017 *PELJ* 1-47, 6.

¹¹¹ Kondo 2017 *PELJ* 6; *Southern African Development Community Model Bilateral Treaty Template* (2012) (SADC Model BIT) 12.

¹¹² Kondo 2017 *PELJ* 6; SADC Model BIT 12.

¹¹³ Kondo 2017 *PELJ* 6; SADC Model BIT 12.

¹¹⁴ Kondo 2017 *PELJ* 7; SADC Model BIT 12.

¹¹⁵ Kondo 2017 *PELJ* 7; SADC Model BIT 12.

¹¹⁶ Kondo 2017 *PELJ* 7; SADC Model BIT 12.

¹¹⁷ For a discussion of the *Annex 1 (Co-operation on Investment) of the Southern African Development Community Protocol on Finance and Investments* (2006) (2006 Annex 1), see also Kondo 2017 *PELJ* 1- 47; Ngoben and Fagbayibo 2015 *LDD* 175-192.

August 2017.¹¹⁸ The 2006 Annex 1 may still be applicable to disputes that arose during its tenure, depending on the facts. The definition of an investment in terms of these annexes will now be discussed.

2.2 The definition of an investment in terms of the 2006 Annex 1

The 2006 Annex 1 defines an investment as every kind of asset, and particularly movable and immovable property, shares, claims to money, copyrights, industrial property rights and concessions under public law.¹¹⁹

This is an open-list, non-exhaustive, asset-based definition. It covers the widest possible range of asset categories, and for this reason investors favour it.¹²⁰ However, this definition is bad for host states because it increases the scope of covered investments, thereby exposing them to more claims.¹²¹ It will be recalled that the claimant in *Romak* argued that the definition should be given a wide interpretation,¹²² while the tribunal rejected the argument and confined the definition by means of the *Salini* criteria.¹²³

This definition is similar to that considered in *Romak*¹²⁴ and *Bernhard Von Pezold*.¹²⁵ As stated above, the tribunal in *Romak* applied the *Salini* criteria to the definition, with the result that the tribunal found that *Romak* had not made an investment.¹²⁶ In *Bernhard Von Pezold* the claimants vehemently argued their cases based on the basis of the *Salini* criteria.¹²⁷ However, the tribunal declined to apply the *Salini* criteria to the definition. Instead, the tribunal considered the ordinary meaning of an investment, and found that the claimants had made investments in the form of farms.¹²⁸ This outcome confirms the narrowing or restrictive effect of the *Salini* criteria when they are applied to wide asset-based definitions of an investment.

The 2006 Annex 1 provides for the referral of investor-state disputes to ICSID, UNCITRAL or other arbitration.¹²⁹ The question that arises is whether a non-

¹¹⁸ Chidede 2017 <https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html>.

¹¹⁹ Article 1(2) of the 2006 Annex 1.

¹²⁰ SADC Model BIT 12.

¹²¹ SADC Model BIT 12.

¹²² *Romak* paras 175, 178.

¹²³ *Romak* paras 179, 188.

¹²⁴ *Romak* paras 97, 174.

¹²⁵ *Bernhard Von Pezold* para 310.

¹²⁶ *Romak* paras 179, 188.

¹²⁷ *Bernhard Von Pezold* paras 231-283.

¹²⁸ *Bernhard Von Pezold* paras 309-327.

¹²⁹ Article 28 of the 2006 Annex 1.

ICSID tribunal can apply the *Salini* criteria in interpreting the definition of an investment provided by the 2006 Annex 1 as stated above.

The preferred view is that such a tribunal may follow *Romak* and apply the *Salini* criteria. Furthermore, the definitions of an investment in the 2006 Annex 1 and *Romak* are the same. The *Romak* tribunal's reasoning to the effect that it is absurd to have two definitions of the same investment simply because of the differences in the application of ICSID or UNCITRAL arbitration rules finds acceptance. *Romak* also gets support from *Grupo Francisco Hermando Contreras v Republic of Ecuador*, where the tribunal held that *Salini* can be applied in ICSID Additional Facility arbitration.¹³⁰ It must be noted in this regard that ICSID Additional Facility arbitration is not in terms of the ICSID Convention, and is therefore non-ICSID arbitration.¹³¹ Hence, in terms of the reasoning in *Romak*, the *Salini* criteria can be applied to ICSID Additional Facility arbitration.

Even though *Bernhard Von Pezold*, *Mohamed Al-Kharafi v Libya* and others did not follow *Romak*, it is submitted for the reasons that follow that these two decisions in particular do not detract from the acceptability of *Romak*. In *Bernhard Von Pezold*, a UNCITRAL arbitration wherein the definition of an investment was also the same as in *Romak*, the claimants urged the tribunal to apply the *Salini* criteria to the case.¹³² The tribunal declined to apply the *Salini* criteria, stating that they were not authoritative.¹³³ Nonetheless, in the end the tribunal quietly applied the *Salini* criteria and found that the claimants had made a contribution,¹³⁴ that they had made and controlled the investments.¹³⁵

The *Bernhard Von Pezold* tribunal's grounds for not following *Salini*, namely that *Salini* is not authoritative, are not convincing. It is common cause that the *Salini* criteria are not and were not meant to be authoritative. In any event, there is no judicial precedent in ISDS cases that would make the *Salini* criteria mandatory. The criteria are merely a guide as to the characteristics that an investment must have, as shown above.¹³⁶ Therefore, for the tribunal to dwell on that aspect does not make for a convincing argument. It would have been appropriate for the tribunal to consider the *Salini* criteria, since the tribunal proceeded to determine

¹³⁰ *Grupo Francisco Hermando Contreras v Republic of Ecuador* (ICSID Case No ARB/(AF)/12/2) Award on Jurisdiction of 4 December 2015.

¹³¹ See the Introduction to the ICSID Additional Facility Rules: ICSID 2006 https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf.

¹³² *Bernhard Von Pezold* paras 255-261.

¹³³ *Bernhard Von Pezold* para 285.

¹³⁴ *Bernhard Von Pezold* paras 286-288.

¹³⁵ *Bernhard Von Pezold* paras 312, 314.

¹³⁶ See the conclusion of the discussion of the *Salini* criteria in 1.

whether the claimants had made investments or not by considering the manner in which the investments had been made, financed and managed.¹³⁷

Another recent UNCITRAL decision involving an African state that did not apply the *Salini* criteria is *Mohamed Al-Kharafi v Libya*. This case is notable because the tribunal ordered damages of almost USD 900 million, based on the application of the relevant investment treaty.¹³⁸ In this case, Libya had argued that there was no qualifying Arab investment since no transfer of Arab capital had been made from Kuwait (the claimant's home state) to Libya (the host state).¹³⁹ However, this case is not authoritative on the issue under discussion, since the tribunal made no reference to *Salini* in its decision.

The trend in *Bernhard Von Pezold* and *Mohamed Al-Kharafi*, which were decided six and four years after *Romak* respectively, could be seen as potentially diluting the value of *Romak*. However, this is not the case, for the reasons stated above. *Romak*'s value is that it has endorsed the possibility of applying the *Salini* criteria to non-ICSID arbitration. *Romak* is supported by a thrust to incorporate the *Salini* criteria in legal instruments. For example, the fact that *Salini* got support from the SADC Model BIT,¹⁴⁰ the *Pan African Investment Code* (PAIC)¹⁴¹ and the *India Model Bilateral Treaty Template*¹⁴² vindicates the decision in *Romak*. The PAIC¹⁴³ and India Model BIT¹⁴⁴ go beyond arbitral tribunals by incorporating the *Salini* criteria, while the SADC Model BIT¹⁴⁵ strongly recommends it.

The effect of the application of the *Salini* criteria to the definition of an investment in the 2006 Annex 1 will be that should a dispute arise, some of the categories of investments in the above definition such as shares, claims to money, or copyright, may not meet the *Salini* criteria as they are not in the form of a business.¹⁴⁶ In other words, the mere holding of an asset that falls within the categories stated in the above definition will not suffice to render the asset to be an investment.¹⁴⁷

¹³⁷ *Bernhard Von Pezold* paras 309-327.

¹³⁸ *Mohamed Abdulmohsen Al-Kharafi and Sons Co Kuwaiti Company v The Government of The State of Libya* (PCA Case No 2011-09) Award on Merits of 2 March 2015 (*Mohamed Al-Kharafi*) 392 para 7.

¹³⁹ See Libya's objection in *Mohamed Al-Kharafi* 67 para d-3.

¹⁴⁰ SADC Model BIT 13

¹⁴¹ Article 4(4) of the *Pan African Investment Code* (2016) (PAIC).

¹⁴² Article 1.2.1 of the *India Model Text for the India Bilateral Investment Treaty* (2015) (India Model BIT).

¹⁴³ Article 4(4) of the PAIC.

¹⁴⁴ Article 1.2.1 of the India Model BIT.

¹⁴⁵ SADC Model BIT 13.

¹⁴⁶ In fact, all the investment categories stated may not meet the *Salini* criteria, by virtue of their nature ie the 2006 Annex 1 uses an open-list asset-based definition and not an enterprise based one.

¹⁴⁷ *Romak* para 188.

This is primarily because such an asset will fail to meet the *Salini* criteria of a contribution, risk, duration and contribution to the host state. Furthermore, the rendering of such an asset to be an investment would lead to the absurd result that the same asset might not qualify as an investment in ICSID arbitration. This is the outcome that the tribunal in *Romak* held would be absurd and unreasonable.¹⁴⁸ Put differently, the *Salini* criteria if applied to the 2006 Annex 1 would have the effect of reducing the scope of covered investments, to the detriment of investors. On the other hand, such an effect would be of benefit to host states, as they would face a reduced number of potential claims. In any event, SADC has taken the step of eliminating this exposure by removing access to arbitration in the 2016 Annex 1, which is discussed next.

It is noteworthy that the SADC Model BIT recommended the cessation of the use of wide definitions such as that in the 2006 Annex 1 in favour of an enterprise-based definition that is contained in the 2016 Annex 1.¹⁴⁹ As an alternative, the SADC Model BIT proposed that should an asset-based definition of an investment be used, it must be curtailed by providing that the definition must meet the *Salini* criteria.¹⁵⁰

The next section will discuss the definition of an investment provided in the 2016 Annex 1. The discussion will also indicate the extent to which the SADC adhered to its own recommendations stated in the preceding paragraph.

2.3 The definition of an investment in terms of the 2016 Annex 1

The 2016 Annex 1 defines an investment as:¹⁵¹

... an enterprise within the territory of one Member State established, acquired or expanded by an investor of the other Member State, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host State and registered in accordance with the legal requirements of the Host State.

It is noteworthy that in terms of this definition an investment must be in the form of an enterprise or business. This is a big departure from the investor-friendly definition provided in the 2006 Annex 1. This definition excludes assets that were covered by the definition provided by the 2006 Annex 1, such as debt securities

¹⁴⁸ *Romak* para 184.

¹⁴⁹ SADC Model BIT 13.

¹⁵⁰ SADC Model BIT 13.

¹⁵¹ Article 1(2) of the *Southern African Development Community Agreement Amending Annex 1 (Co-operation on Investment) of The Protocol on Finance and Investment* (2016) (2016 Annex 1). Emphasis added.

issued by a government, portfolio investments and claims to money that arise solely from commercial contracts for the sale of goods or services.¹⁵² This definition is bad for investors and good for host states, as it limits the scope of covered investments. It is even worse for investors that this definition covers enterprises owned by SADC nationals only.¹⁵³ Therefore, enterprises owned by non-SADC persons will not be covered.

This definition is designed to overcome the wide range of coverage of investments that is provided by asset-based definitions such as that provided by the 2006 Annex 1. In this regard, the definition is a success for host states, to the dismay of investors.

The SADC Model Treaty recommended this definition,¹⁵⁴ and the PAIC also uses it.¹⁵⁵ Although these instruments are not legally binding, they are relevant as they are authored by the SADC and the African Union as recommendations to their member states. Hence, it is worthwhile to consider the extent to which they are adopted by African states within and beyond SADC.

The 2016 Annex 1 refers investor-state disputes to the courts of host states.¹⁵⁶ Since the Annex does not provide for ISDS, there is no outright answer in regard to whether the *Salini* criteria can be applied to disputes arising out of the Annex. *Salini* arose out of an arbitration that the Annex does not provide for. The question that arises then is whether *Salini* can be applied to an investor-state dispute in a court of a host state, since litigation is the only remedy that an investor can resort to in terms of the Annex. The answer ought to be that a court of law should have regard to the *Salini* criteria if it so wishes and if it is legally permitted to do so. There is no reason why the use of the *Salini* criteria must be restricted to ISDS only. Doing so may mean that an enterprise may be an investment in an arbitration, while the same enterprise may be an investment according to a court of a host state. Therefore, it makes sense that both tribunals and courts should consider the same criteria.

It is argued that a court that has to determine the existence of an investment may resort to tribunal decisions, including *Salini*, on three grounds at the least. Firstly, the rationale in *Romak* to the effect that it does make sense to have different definitions of the same investment purely because using different instruments to define the investment is not logical finds acceptance. Secondly, the incorporation of the *Salini* criteria in model treaties as indicated in the preceding section lends

¹⁵² Article 1(2) of the 2016 Annex 1.

¹⁵³ See the definition as well as Kondo 2017 *PELJ* 9.

¹⁵⁴ SADC Model BIT 13.

¹⁵⁵ Article 4(4) of the PAIC.

¹⁵⁶ Article 27 of the 2016 Annex 1.

support to the use of the *Salini* criteria in investor-state litigation. There is no reason why a court of law should not have the benefit of using the *Salini* criteria to assist it in assessing the existence of an investment, while an ISDS tribunal can do so. This is more so as the definition of an investment in terms of the 2016 Annex 1 requires that an investment be in the form of an enterprise, just as the *Salini* criteria does. It may also be said that SADC member states as members of the AU participated in the adoption of the PAIC, which incorporates the *Salini* criteria. Therefore, they are not necessarily averse to the use of the *Salini* criteria in investor-state disputes to which they are parties. Furthermore, as stated in the preceding section, the SADC itself proposed in its Model BIT that the *Salini* criteria be considered for inclusion in investment treaties. Thirdly, from a host state perspective, the use of the *Salini* criteria reduces exposure to investor claims. Therefore, the *Salini* criteria are host state-friendly. While investors may not like the use of the *Salini* criteria in investor-state litigation, it must be borne in mind that nothing prevents the SADC from closing the debate by amending the 2016 Annex 1 to specifically incorporate the *Salini* criteria and to provide for its use before the courts of host states. Host states wield regulator authority and can do as they wish in terms of enacting amendments to the SADC FIP and domestic laws. The SADC has proven this by repealing the 2006 Annex 1 that provided wide coverage of investments and thus exposed host states to more ISDS claims.

3 Concluding observations

It is a fact that arbitral tribunals are nowhere near reaching an agreement on what an investment is or ought to be. Given the lack of judicial precedent in ISDS, it is impossible that one tribunal can lay the matter to rest.

The answer to the question posed in the title herein is that the *Salini* criteria should apply to non-ICSID ISDS cases and litigation involving either the 2006 or the 2016 Annex 1. The implication thereof is that applying the *Salini* criteria to the 2006 Annex 1 would impact on investors by reducing the scope of the investors and investments that would be covered. On the flipside, host states would benefit from the application of the *Salini* criteria in that they would face a reduced number of potential claims as only investments that are in the form of enterprises will be protected. On the other hand, the use of the *Salini* criteria on the 2016 Annex 1 would not have a major effect relative to the definition of an investment provided in the Annex. This is because the *Salini* criteria require an investment to be in the form of a business, just as the 2016 Annex 1 does.

In support of the use of the *Salini* criteria in the 2006 and 2016 Annex 1, it is noteworthy that some states such as India have taken control of the situation and are incorporating the *Salini* criteria into model treaties and regulatory instruments.

It has been shown above as well that the SADC through its Model BIT, and the AU through the PAIC, both gradually incorporated the *Salini* criteria in their definitions of an investment. This incorporation makes it easy for tribunals to make a determination of whether the *Salini* criteria should be applied in non-ICSID ISDS. Furthermore, the incorporation of the *Salini* criteria addresses the lack of judicial precedent, in that even ICSID arbitral tribunals will be obliged to apply the *Salini* criteria if they are incorporated in a regulatory instrument such as a BIT, TIP, legislation or investment contract.

The *Salini* criteria have contributed immensely to the debate around what an investment ought to be, as can be seen from both the positive and the negative responses of subsequent tribunals and states. The criteria are a useful guide with regard to the characteristics that an investment ought to have. Admittedly, investors who are covered by wide definitions such as that in the 2006 Annex 1 or in cases such as *Romak* would not like the *Salini* criteria to be applied to their cases, as that would disqualify most of the asset categories from being investments. As the SADC Model BIT notes, investors like wide definitions, and anything that narrows the scope of covered investments will not go well with them.

However the reality is that wide, vague, open-ended definitions of investments are not sustainable for developing states, mainly due to the legal and financial risks they expose such states to. The protracted litigation they cause is of no benefit to either investors or host states. Hence new generation regulatory instruments such as the 2016 Annex 1 and model treaties such as the India Model BIT are moving away from wide, open-ended definitions of investments, in favour of enterprise-based definitions. This builds up towards a more uniform and predictable understanding of what an investment ought to be. Unfortunately for investors, host states wield regulatory authority and will, where they see fit, amend their regulatory instruments to reduce the risk of investor-state claims.

The amount of time and funds spent by parties with regard to whether an investment exists or not is unwarranted, especially given that states use taxpayers' funds in such disputes. This can only increase the overall cost of arbitration or litigation, which is already high, especially for developing states. Granted, the status quo was worsened by BITs and other instruments that provided wide, open-ended categories of investments, such as those considered in *Romak* and *Bernhard Von Pezold*. Those days are coming to an end, as the SADC and the PAIC introduced an enterprise-based definition of an investment. This will lead to some ease in the determination of whether an enterprise exists or not.

However, the SADC ought to have followed the recommendation of its own Model BIT and incorporated the *Salini* criteria into the 2016 Annex 1. The PAIC has beaten the SADC to the post on this issue by incorporating the *Salini* criteria in its definition of an investment. African states as parties to the PAIC should heed the PAIC's recommendations and include the *Salini* criteria in their foreign investment regulatory instruments. This would minimise disputes relating to the existence of investments, and would consequently lessen the time and cost of determining whether or not an investment exists.

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List of Abbreviations

2006 Annex 1	Annex 1 (Co-operation on Investment) of the Southern African Development Community Protocol on Finance and Investments (2006)
2016 Annex 1	Annex to the Southern African Development Community Agreement Amending Annex 1 (Co-operation on Investment) of The Protocol on Finance and Investment (2016)
Arb Int'l	Arbitration International
Aust ILJ	Australian International Law Journal
Berkeley J Int'l L	Berkeley Journal of International Law
BIT	Bilateral investment treaty
BU Int'l LJ	Boston University International Law Journal
Chi J Int'l L	Chicago Journal of International Law
CSOB	<i>Ceskoslovenska Obchodni Banka, AS v Slovak Republic</i>
Fordham L Rev	Fordham Law Review
ICSID	International Centre for the Settlement of Investment Disputes

ICSID Additional Facility Rules	International Centre for Settlement of Investment Disputes <i>Additional Facility Rules</i> (2006)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (with Rules and Regulations) (1965)
India Model BIT	India Model Text for the India Bilateral Investment Treaty (2015)
ISDS	Investor-state dispute settlement
J Int'l Arb	Journal of International Arbitration
JSDLP	Journal of Sustainable Development Law and Policy
JWIT	Journal of World Investment and Trade
LDD	Law, Democracy and Development
LDR	Law and Development Review
LPICT	The Law and Practice of International Courts Tribunals
PAIC	Pan African Investment Code
SADC	Southern African Development Community
SADC FIP	Southern African Development Community Protocol on Finance and Investments (2006)
SADC Model BIT	Southern African Development Community Model Bilateral Treaty Template (2012)
PELJ	Potchefstroom Electronic Law Journal
TCLR	Turkish Commercial Law Review
TIPs	Treaty with investment provisions
TL&D	Trade Law and Development
UNCITRAL	United Nations Conference on International Trade Law
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law Arbitration Rules (2013)
UNCTAD	United Nations Conference on Trade and Development